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80-1683

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Whether an FCC refusal to reject a tariff, in decisions which conclude all agency consideration of the objections raised, is rendered unreviewable by the mere existence of statutory complaint procedures.

Whether the termination of a tariffed communications common carrier service, resulting in substantially increased costs for customers, is exempt from Section 214 (a) of the Communications Act, which requires prior FCC certification before "discontinuing", "reducing" or "impairing" such services, simply because alternative carrier services exist.

PARTIES TO THE PROCEEDING

The following were the parties in this proceeding in the United States Court of Appeals for the District of Columbia Circuit whose judgments are sought to be reviewed:

Aeronautical Radio, Inc.

Air Transport Association of America

American Broadcasting Companies, Inc.

American Newspaper Publishers Association

American Telephone and Telegraph Company

CBS, Inc.

Commodity News Services, Inc.

Consolidated Rail Corporation

Dow Jones & Co., Inc.

Federal Communications Commission

General Electric Company

Microwave Communications, Inc.

National Broadcasting Company, Inc.

Southern Pacific Communications Company

The Associated Press

The Western Union Telegraph Company

United Press International, Inc.

United States of America

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

General Electric Company ("GE")[1] petitions for a writ of certiorari to review the final judgments of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (ARINC App. 1-53[2]) and the order and opinion on rehearing (ARINC App. 54-62, 63-66) are not yet officially re-

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[1] General Electric Company is a publicly-held corporation which has no parent company. Appendix A hereto is a listing of GE's active non-wholly owned subsidiaries and affiliates.

[2] "ARINC App." refers to the appendix to the petition filed by Aeronautical Radio, Inc. and Air Transport Association of America (hereinafter "ARINC") in No. 80-1343.

ported. The opinions and orders of the Federal Communications Commission involved are reported at 64 F.C.C. 2d 959 (ARINC App. 67-78), 64 F.C.C.2d 958 (ARINC App. 79) and 65 F.C.C.2d 7 (ARINC App. 80-81).

JURISDICTION

The judgment of the court of appeals (ARINC App. 194-195) was initially entered on June 24, 1980, but was amended, and as amended, was entered on November 5, 1980 (U.S. App. D[3]). The court of appeals' orders regarding rehearing and rehearing *en banc* were entered on November 5, 1980, November 26, 1980, and January 27, 1981 (ARINC App. 196-198). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 201-209 and 214 of the Communications Act of 1934, 48 Stat. 1164, as amended, 47 U.S.C. §§ 201-209, 214 and Sections 61.38 and 61.58 of the Rules and Regulations of the FCC, 47 C.F.R. §§ 61.38, 61.58, are set forth at ARINC App. 199-213.

STATEMENT

Ultimately at issue is a decision of the Federal Communications Commission denying petitions to reject an American Telephone and Telegraph Company tariff proposing to terminate Telpak service. The nature of that service, and the course of the proceedings before the FCC, have been set forth in the petitions of ARINC and the Solicitor General in Nos. 80-1343 and 80-1408 (ARINC Pet. 4-9; U.S. Pet. 2-4), and will not be repeated herein.

In the court of appeals below, GE contended the FCC's actions to be fatally deficient in two major respects.

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[3] "U.S. App. D" refers to Appendix D to the petition filed by the Solicitor General, on behalf of the United States, in No. 80-1408.

First, it was argued, the Commission erred in its interpretation of Section 214(a) of the Communications Act, 47 U.S.C. § 214(a). While that provision directs that no carrier may "discontinue, reduce, or impair" its provision of existing services unless the FCC first certifies "that neither the present nor future public convenience and necessity will be adversely affected thereby", the Commission had summarily declared the statute "inapplicable" to the termination of Telpak service since, in the Commission's view, the tariff proposal was tantamount to a "change in rates". Based on the plain words of the statute, and even accepting the Commission's tortured characterization of the tariff filing as a mere "rate increase", GE argued that Section 214(a) was nonetheless applicable. And in permitting the tariff to become effective, GE contended, the Commission had breached the statute's clear directives.

Second, it was argued that the Commission had impermissibly excused AT&T from compliance with Section 61.38 of its Rules, 47 C.F.R. § 61.38, which requires carriers to file a variety of data in support and explanation of proposed tariff revisions. In this regard, the Commission—now viewing the tariff as terminating an "offering" and *not* "changing rate levels or creating new rate structures"—had declared the Rule 61.38 requirement "inapplicable". Against the possibility it was wrong, the Commission alternatively waived the Rule *sua sponte*. GE argued neither alternative action to have been proper.

Confronting those arguments, the court of appeals issued two dramatically different decisions—the first on June 24, 1980 (hereinafter "*June Order*") and the second (on reconsideration) on November 5, 1980 (hereinafter "*November Order*"). In its *June Order*, the court reversed the FCC and directed that AT&T's tariff filing be rejected as unlawful. The Commission's determinations with respect to Section 214 of the Communications

Act were summarily affirmed. (ARINC App. 23-24.) However, the court held that Section 61.38 of the Commission's Rules was applicable to the tariff filing, that the Commission had abused its discretion in waiving that Rule, and that the agency had consequently erred in refusing to reject AT&T's tariff. (*Id.* at 25, 27.) In the court's view (*id.* at 25-26):

> The purpose of § 61.38 is not only to provide the Commission with the information it needs to appraise tariff filings, but also to provide customers, competitors, and the public with that information so that they may intelligently participate in the Commission proceedings. . . . Waiver of the rule deprived the public of this opportunity to participate.
>
> If the tariff filing in this case were a less significant one, the Commission's action, with its attendant effect on the public's ability to participate, might nonetheless be justifiable. However, this filing was to have a massive effect: a total increase in charges of approximately $100 million per year was to take place. Certainly, the affected customers should have had the relevant data and an opportunity to comment on proposed increases of this magnitude.

In its *November Order* (*id.* at 54-62), however, the court did a dramatic about-face. For the first time, the court held unqualifiedly that FCC decisions refusing to reject tariffs—irrespective of the grounds for such actions, and notwithstanding the conclusion of agency proceedings on the objections raised—are unreviewable. In the court's view, the mere fact that complaint procedures are provided for in Section 208 of the Communications Act, 47 U.S.C. § 208—pursuant to which the court believed the same or similar contentions might be advanced in the future—rendered the FCC's rulings non-final, and thus exempt from judicial scrutiny. (ARINC App. 58-62.)

The opinion which accompanied the *November Order* stressed the court's abiding "discontent with the Commission's actions". (ARINC App. 66.) And the decision itself (*id.* at 62) reflected the court's belief that neither the Commission's "summary procedures" nor its own holding yielded a satisfactory result:

> Such [FCC] actions deprive the public of potentially valuable information and force protestants to institute a cumbersome complaint procedure to address the merits of the tariff revision.

Nonetheless, the court ruled that its turn-about was compelled by this Court's decision in *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979), and the D.C. Circuit's own decision in *Papago Tribal Utility Authority* v. *FERC*, No. 79-1562 (D.C. Cir. June 23, 1980), *cert. denied*, 49 U.S.L.W. 3443 (Dec. 16, 1980). While it acknowledged significant factual distinctions from the *Southern Railway* and *Papago* holdings, the court claimed that its hands were nonetheless tied (*id.* at 66):

> Both these decisions, in which courts declined to review agency orders regarding acceptance of rate revisions, might be distinguished as involving agency procedures less summary than those employed by the FCC here. The *Papago* customers had the protection of (1) cost justification date, (2) suspension of the increased rates, (3) an ordered hearing on the merits of the rate increases, and (4) a refund order of the full over-charge if rate increases were found unlawful. . . . In *Southern Railway*, although there was no suspension or ordered hearing, the customers had the protection of (1) cost justification data, (2) ICC orders requiring the Railroad to document the effects of the rate changes, and (3) agency monitoring of the Railroad's financial condition. . . . *The AT&T customers had none of these protections.* Their only resort is to the complaint procedure of

> the Communications Act. . . . Under both *Papago* and *Southern Railway*, however, this remedy alone suffices to render the FCC order non-final and unreviewable. [Emphasis added.]

In *Orders* issued January 27, 1981, the court of appeals denied the Justice Department's requests for reconsideration or rehearing *en banc* with respect to the *November Order*. (ARINC App. 197-198.)

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Patently Erroneous Construction Of The Communications Act Represents An Important Federal Question Requiring Review By This Court

Section 214(a) of the Communications Act requires, among other things, that before a communications common carrier may "discontinue, reduce, or impair service to a community, or part of a community", it must first obtain from the Commission "a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby". 47 U.S.C. § 214(a). Where tariffs filed by a carrier propose actions for which such certificate authority is required, but has not been obtained, such tariffs are deemed *prima facie* unlawful, and must be rejected.[4]

AT&T's subject tariff revisions "provide[d] for the termination of Telpak service". (ARINC App. 69.) In the FCC proceedings at issue, GE argued that, because the tariff proposed to "discontinue, reduce, or impair" an existing service, prior certificate authority pursuant to Section 214(a) was required. Since AT&T had neither requested nor been granted such authority by the Com-

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[4] E.g., *Associated Press* v. *FCC*, 448 F.2d 1095 (D.C. Cir. 1971); *American Tel. & Tel. Co.* v. *FCC*, 487 F.2d 865, 800, n. 33 (2d Cir. 1973); *Press Wireless, Inc.* v. *FCC*, 264 F.2d 372 D.C. Cir. 1959).

mission, GE contended, the tariffs were *prima facie* unlawful and should be rejected.[5]

The Commission, however, summarily ignored all such considerations. It did *not* define the "communty" of users involved, and refused to hold hearings on the impact a termination of Telpak service would have on them. It did *not* undertake to evaluate whether the particular tariff revision would effect a "discontinuance", a "reduction", or an "impairment" of service. It made *no* deterdetermination "that neither the present nor future public convenience and necessity will be adversely affected" by the termination of Telpak. Instead, the Commission simply ruled that "Section 214 does not apply to the instant tariff revisions", since alternative communications offerings were available to customers, and the termination of Telpak was therefore effectively only a "change in rates". (ARINC App. 73.)

In the court of appeals, GE contended that the Commission was required to at least *consider and decide* whether the termination of Telpak—even accepting *arguendo* its characterization as merely a "change in rates"—represented a "discontinuance, reduction or impairment of service" under Section 214.[6] In a single paragraph, however, the court of appeals summarily declared that Section 214(a) "did not apply in this case"; since the termination of Telpak served only to "eliminate a rate discount, thereby effectuating a rate increase", that carrier action "did not in fact discontinue, reduce, or impair any service at all". (ARINC App. 23-24.)

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[5] See, e.g., GE "Petition to Suspend", AT&T Transmittal No. 12714, filed April 7, 1977, p. 8; GE "Petition for Reconsideration, Extension of Section 203 Notice, and Suspension", AT&T Transmittal Nos. 12714 and 12765, filed June 14, 1977, pp. 5-12.

[6] "Brief for Petitioner General Electric Company", July 14, 1978, pp. 27-38; "Reply Brief for Petitioner General Electric Company", December 15, 1978, pp. 4-18.

A. The court of appeals' determination that Telpak is not a "service" was in error

The court of appeals' determination that Telpak was not a "service" for purposes of Section 214(a) was both gratuitous and erroneous. As the offering carrier, AT&T originally promoted and justified the Telpak offering as a distinct new "bulk communications service", specifically designed "to meet the large and growing requirements of government agencies and industry for large capacity communications facilities between specified points".[7] Thereafter, both at the Commission and in the courts, AT&T consistently opposed arguments that Telpak is "like" its other private line services, arguing "that the Telpak tariff offering represents a reasonable classification of service".[8]

The Commission had likewise viewed Telpak to represent a discrete character of service offering. In *Resale and Shared Use*, 60 F.C.C.2d 261 (1976), on reconsideration, 62 F.C.C.2d 588 (1977), aff'd sub nom. *American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978), for example, the Commission separately addressed the relationship between the new policies being considered in that proceeding and the

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[7] Letter from Richard Miller to the FCC, AT&T Transmittal No. 6563, February 10, 1961. See also, e.g., *TELPAK (Tentative Decision)*, 38 F.C.C. 370, 375 (1964):

> AT&T contends that there is a public need for bulk communications service; that TELPAK meets this need; and that TELPAK will promote the use of *bulk communications service*. [Emphasis added.]

AT&T created a separate tariff service category, Series 5000, for Telpak; different tariff regulations apply to Telpak than apply to other private line services; costs have been allocated (and earnings and rates of return calculated) separately for Telpak service and other AT&T private line services.

[8] *TELPAK (Tentative Decision)*, *supra*, 38 F.C.C. at 375.

Telpak service offering. And its reasons were stated in straightforward fashion:

> Telpak is a "bulk rate" tariff offering which provides a substantial economic incentive for sharing and resale, and *it has characteristics distinct from other private line services.* We therefore must separately consider the restrictions on sharing of Telpak and on resale of Telpak.

60 F.C.C.2d at 264 (emphasis added). Indeed, the Commission made quite clear to the Second Circuit in 1978 both that Telpak was a discrete "service", and that Section 214 applied to its termination:

> . . . Telpak has been declared unlawful and must be replaced or withdrawn altogether as a service offering. If AT&T does not want to allow resale or sharing of Telpak, *it can apply to the Commission for permission under Section 214 to discontinue the service.*[9]

B. Even if Telpak is viewed as merely a rate increase, the court of appeals' construction of Section 214(a) is nonetheless in error

In ruling the statutory certification requirement inapplicable, the court of appeals' ultimate predicate was an unqualified determination that Section 214(a) does not extend to *any* service rate increases. To that extent, the decision was patently inconsistent with the plain language of the Communications Act. On its face, Section 214(a) flatly forbids carriers to "discontinue, reduce, or impair service" unless prior FCC certificate approval has been obtained. The wording of Section 214(a) is unqualified; it does not exempt *any* type of carrier conduct from the

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[9] *American Tel. & Tel. Co.* v. *FCC*, 572 F.2d 17 (2d Cir. 1978), "Opposition of Federal Communications Commission to Motion of AT&T for Stay Pending Judicial Review", at p. 20 (emphasis added).

prior certificate requirement. *Whatever* carrier action is involved, if that action serves to "discontinue", to "reduce", or to "impair" service previously provided, prior FCC certificate approval is Congressionally mandated.

Clearly, particular types of rate increases can as surely "reduce" or "impair" service, if not effectively "discontinue" it, as the dismantling of a microwave station or a reduction in operating hours of a public telegraph office. A carrier's doubling of a present service charge, for example, may render that particular service as unavailable to customers using it as if the service were simply withdrawn, or the permissible time for its use curtailed. And even if it were not deemed a "discontinuance", the effect of such an increase could plainly serve at least to "reduce" or to "impair" the service effectively remaining available to users. Before both the FCC and the court of appeals, Telpak users sought to show that just such results would occur with the demise of Telpak.

Significantly, the FCC's brief to the court of appeals below did not directly dispute GE's reading of the statutory words in this respect. Rather, the agency effectively acknowledged that Section 214(a) *may* extend to at least *some* rate increases. (See, e.g., the FCC's Respondent's Brief to the court below, p. 42.) And in other contexts, the Commission has directly ruled that the repricing of certain carrier offerings may well give rise to a Section 214 certification requirement. E.g., *Graphnet Systems, Inc.*, 63 F.C.C.2d 402, 410, n. 9 (1977). Yet the court of appeals' *June Order* summarily excuses the Commission even from having to *consider* whether the effect of *any particular rate increase* renders the Section 214(a) requirement operative.

Two reasons for ignoring the plain wording of Section 214(a) were advanced in the court's decision. First, it was said, unless GE's construction of the statute was rejected, "virtually every rate increase might be argued

to be a discontinuance of 'service' requiring a prior finding of convenience and necessity by the Commission" with "attendant burdens [which] would be enormous" (ARINC App. 24.) That some "burdens" on the agency might result, however, is without significance in determining the applicability of Section 214(a). For such "burdens" are those specifically intended by Congress. And the court of appeals was not privileged gratuitously to excuse the agency from responsibilities imposed imposed by the legislature. As this Court has observed in *Jay* v. *Boyd*, 351 U.S. 345, 357 (1976), "we must adopt the plain meaning of a statute, however severe the consequences".[10]

The second basis for the court of appeals' conclusion was an unexplained assertion that applying Section 214 to any rate increase "would be at odds with the scheme of carrier-initiated tariff filings" embodied in Sections 203-205 of the Communications Act, 47 U.S.C. §§ 203-205. (ARINC App. 24.) In fact, however, there is no inconsistency between the requirements of Section 214 and the allowances of Sections 203-205. Rather, by specific Congressional design, use of the tariff filing processes is simply conditioned on a *prior satisfaction* of any applicable Section 214 requirements.[11] The application of

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[10] In fact, the "burdens" of apparent concern to the court of appeals are far more manageable than its decision suggests. As GE acknowledged, not *every* rate increase will be tantamount to a Section 214 "discontinuance", "reduction", or "impairment" of service. And in ascertaining which proposals are reached by the statute, the FCC is not left only to multitudinous *ad hoc* proceedings—a result the court below may have feared. Equally available to the Commission are appropriately-fashioned rulemaking approaches which might reduce substantially the number of specific arguments it would be required to address. Ultimately, however, such matters are for the Commission, not the court of appeals, to resolve.

[11] E.g., *MCI Telecommunications Corp.* v. *FCC*, 651 F.2d 365, 375 (D.C. Cir. 1977) *cert. denied*, 434 U.S. 1040 (1978); *Press*

Section 214(a) to service charge increases of the size here involved is *not*, therefore, "at odds" with the tariff filing entitlements of Sections 203-205. Rather, satisfaction of Section 214(a) is a Congressionally-mandated *prerequisite* to the Section 203-205 tariff-filing entitlements.

C. The court of appeals' specific exemption of the Telpak termination from the Section 214(a) certification requirement was impermissibly based on independent factual determinations

Whether a particular rate increase constitutes a "discontinuance", a "reduction" or an "impairment" of service under Section 214(a) critically depends on the practical impact of that increase on the community of users affected. As the court of appeals recently acknowledged, "in individual cases questions concerning the economic impact of the Section 214(a) authorizations on the immediate parties . . . may arise". *Lincoln Tel. & Tel. Co.* v. *FCC*, No. 79-1487 (D.C. Cir. January 28, 1981), slip op. at 20. With respect to Telpak, if the Commission had determined that the effect of its termination on Telpak users did *not* represent a "discontinuance", a "reduction" or an "impairment" of service within the meaning of the statute, the Commission's task might have been ended. On the other hand, had the Commission concluded otherwise, it could then have permitted a termination of Telpak if it further certified "that neither the present nor future public convenience and necessity will be adversely affected thereby". But *either* determination required an evidentiary inquiry and appropriate *factual* determinations. And that function was the FCC's alone to perform in the first instance. As it was correctly ob-

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Wireless, Inc. v. *FCC*, 264 F.2d 372 (D.C. Cir. 1979) (per curiam). The FCC has, of course, rejected other AT&T tariff filings squarely on the ground that necessary Section 214(a) discontinuance authority had not yet been obtained. E.g., *American Tel. & Tel. Co.*, FCC 78-807 (released November 30, 1978).

served in *ITT World Communications Inc.* v. *New York Tel. Co.*, 381 F. Supp. 113, 120 (S.D.N.Y. 1974):

> [Section 214] leaves *exclusively within the jurisdiction of the Commission* the determination of whether to grant a certificate of convenience and necessity and *to determine in a proper proceeding whether a certificate is necessary in the premises.* [Emphasis added.]

Instead of remanding the matter to the FCC to make those determinations, however, the court of appeals concluded that "the termination of the TELPAK 'service' *did not in fact* discontinue, reduce, or impair any services". (ARINC App. 23 (emphasis added).) In so doing, of course, the court of appeals improperly arrogated to itself a task exclusively that of the Commission. As the Fifth Circuit has aptly pointed out:

> [A] Court [of Appeals] reviews cases, it neither tries nor retries fact issues. Thus we must not be understood as even intimating that we can engage in the fact-finding process at the appellate level.[12]

II. The Court of Appeals' Novel Extension Of The Scope Of Unreviewability Requires Reversal By This Court

The court of appeals' decisions below represent a substantial constriction of the appellate entitlements of par-

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[12] *Hill York Corp.* v. *American Int'l Franchises, Inc.*, 448 F.2d 680, 691 (5th Cir. 1971). Cf. also *Miller* v. *Avirom*, 384 F.2d 319, 321, n. 8 (D.C. Cir. 1967); *Meyer* v. *Missouri State Highway Comm'n*, 567 F.2d 804, 809 (8th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

Significantly, while the court below concluded that the termination of Telpak service would not "reduce" or "impair" service, the only factual information of which notice could even arguably be taken by the court—that accompanying requests for stay pending appeal—was directly to the contrary. For that data established *prima facie* that the proposed elimination of Telpak, even if viewed only as a rate change, would in fact result in at least a "reduction" or an "impairment" of service to existing customers. Indeed, *the deciding panel itself* recognized that the tariff "was to have a massive effect". (ARINC App. 26.)

ties to administrative tariff proceedings—one which will appy not only to future FCC rulings, but to those of such other regulatory entities as the FERC and the ICC as well. For the first time, the District of Columbia Circuit has basically held that *no* agency decisions denying objections to carrier tariffs is reviewable before such tariffs become effective—whether or not the agency action is arbitrary or capricious, whether or not it is based on purely legal conclusions (as to which courts have at least equal "expertise"), and irrespective of any injury resulting to petitioning parties. Instead, parties must first incur the injury unlawful tariffs would cause, and *then* file a complaint against the carrier based on that injury; only at the conclusion of agency complaint proceedings could the public seek judicial relief.

In significant measure, the court of appeals proceeded on the mistaken assumption that the FCC's complaint procedures would provide customers protections equivalent to those afforded by Congress in Sections 201-205 of the Communications Act. As shown below, however, agency data for the past decade in fact confirms the total ineffectiveness of FCC complaint processes. Moreover, in this case specifically, while the court of appeals believed the complaint process to be a "realistic remedy" for Telpak customers (ARINC App. 61), counsel for the FCC has now directly confirmed to this Court that future Telpak complaints would be a futile exercise—that neither Telpak customers nor this Court may expect any different agency treatment of the subject. (See p. 19, *infra*.)

A. The court of appeals' decision rests on a misinterpretation of this Court's *Southern Railway* decision

The *November Order* was ultimately based on a determination that a holding of unreviewability in this case was compelled by this Court's decision in *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, *supra*. In the court of appeals' view (ARINC App. 60-61):

> The . . . *Southern Railway* case[ ] require[s] us to hold that the availability of a statutory complaint procedure renders the FCC's acceptance decision in this case non-final.

That conclusion, however, was plainly in error. Central to *Southern Railway*—which involved an ICC decision denying *petitions to suspend or investigate* (not reject) a seasonal rate increase proposed by a group of railways—was the fact that the ICC, in declining to initiate an investigation of the rates under § 15(8) of the Interstate Commerce Act (now recodified at 49 U.S.C. § 10707), had *not* decided the merits of the arguments pressed by those objecting to the carrier's tariff.[13] And the Court's limited holding was that it would not intrude into administrative decisional processes until a *final* agency disposition of arguments presented to it was made.

Here, of course, *the FCC had not reserved judgment* on the merits of the various parties' rejection arguments. Rather, it squarely addressed those contentions. And it directly decided them.[14] Indeed, counsel for the agency laid any uncertainties in that regard to rest following the *November Order:*

> In the Telpak case, the Commission had *finally decided* [the issues] and *did not contemplate a further look at the matter of service discontinuance.*[15]

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[13] See, e.g., 442 U.S. at 452 ("the express language of the Commission's order belies any interpretation of its decision as a ruling on the legality of the carrier's seasonal tariff").

[14] E.g., ARINC App. 75 ("We find that none of the . . . arguments advanced by the petitioners herein . . . show the tariff revisions [terminating Telpak] to be *prima facie* unlawful"). See also *id.* at 76 ("We have found herein that the tariff revisions filed by AT&T to terminate Telpak are not *prima facie* unlawful and should not be rejected nor suspended and investigated").

[15] *The Western Union Tel. Co.* v. *FCC*, No. 78-1955 (D.C. Cir.) (appeal dismissed January 13, 1981), "Memorandum of the Federal Communications Commission in Response to the Court's Order of November 25, 1980", December 15, 1980, p. 3 (emphasis

Unlike the situation in *Southern Railway*, therefore, the "final consequences" of the FCC's ruling were not simply procedural and limited. See 442 U.S. at 454-55. They were substantive and conclusive. *Southern Railway* did not—and, GE submits, was not intended to—reach this case.[16]

As applied to agency refusals to reject tariffs, the fundamental teaching of *Southern Railway* is an uncomplicated one: such determinations are non-final, and thus nonreviewable, where the agency has initiated a proceeding in which the issues raised in support of rejection will be further considered by the agency. That

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added). In this regard, the court of appeals appears to have completely misperceived the procedural circumstances on which it based its decision, observing that "[t]he acceptance of the [Telpak termination tariff] is non-final because it is the initiation of an administrative proceeding". (ARINC App. 29.) With all due respect, however, that assertion was simply wrong. The Commission's denial of rejection initiated *no* further administrative proceedings with respect to Telpak termination, either explicitly or implicitly.

[16] While the Court of Appeals also held its decision in *Papago* to compel its finding of unreviewability, that decision *specifically exempted* the Telpak termination circumstances from the scope of its holding. There, the court confronted an agency denial of requests for tariff rejection, but one *coupled with a simultaneous initiation of a hearing*. It was *because* a proceeding had been begun—one which *specifically addressed the issues raised by the protestants*—that the court found the agency's action to be non-final, and thus unreviewable. See, e.g., *Papago*, slip op. at 9. And the limits of the court's holding in that regard were emphasized:

> *We are not concerned in this case with orders that accept tariff filings and allow them to take effect without investigation or refund obligation.* Such orders would present *different questions of reviewability*. . . .

Papago, slip op. at 5, n. 8 (emphasis added). Compare *American Broadcasting Companies, Inc.* v. *FCC*, No. 78-1968 (D.C. Cir. April 28, 1980)—argued and decided after the *Southern Railway* case—in which the same court of appeals reviewed an FCC refusal to reject a tariff, even though the protestants had not sought relief under 47 U.S.C. §§ 206-209.

basic view was reiterated in *FTC* v. *Standard Oil Co. of Calif.*, 101 S. Ct. 488 (1980), where the Court found issuance of an FTC complaint to be unreviewable because it was not "final agency action" under 5 U.S.C. § 704. Adopting the pragmatic approach to finality determinations counselled by *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967), the *Standard Oil* Court relied principally on the fact that the FTC's action was but the initiation of adjudication—"a determination only that adjudicatory proceedings will commence". 101 S. Ct. at 425. Since that action was "not a definitive ruling or regulation", and "had no legal force or practical effect" on the defendants' business operations, the court was loathe to intrude until those proceedings had been concluded. *Id.* at 426.

Standard Oil, therefore, restates the same basic *quid pro quo* for nonfinality as that articulated in *Southern Railway*—the commencement or pendency of a proceeding in which unresolved challenges to the lawfulness of a tariff will be decided. As noted earlier, however, this is not such a case. The FCC initiated *no* further proceedings. It deferred *no* rulings on the lawfulness of the Telpak termination tariff. Its decision was "a definitive ruling" and had both a "legal force [and a] practical effect" on the protestants' business operations. *FTC* v. *Standard Oil Co. of Calif.*, *supra*, 101 S. Ct. at 494. The *November Order's* conclusion that *Southern Railway* compelled a finding of nonfinality was in error.

B. The court of appeals' decision presents important questions of consumers' procedural rights

In the Communications Act, Congress afforded the public at least two different procedures by which to challenge carrier tariffs, and each for different purposes. The first, under Sections 203 and 204 of the Act, 47 U.S.C. §§ 203-204, establishes an opportunity to contest the generic lawfulness of tariffs prior to their becoming effective. In this context, the propriety of

tariff revisions as a whole can be ascertained before the public is bound by their terms. The second, under Section 208 of the Act, 47 U.S.C. § 208, accords parties an ability to challenge the administration of already-effective tariffs by the carrier. (See, e.g., Appendix B hereto.) In this process, the application of tariff provisions to the individual circumstances of a complainant may be judged; typical are such claims as carrier failures to meet tariff quality-of-service standards, charges at variance with published rates, etc. Courts have recognized that relief available under the complaint processes are "[i]n addition" to those available under Sections 201-205 of the Act.[17]

Aside from the *November Order's* inconsistency with the statutory scheme involved, its practical consequences underscore the need for review by this Court. Until the court of appeals' effective dispensation of carriers from its requirements, Section 61.38 of the FCC's Rules required carriers to submit detailed data to support tariff revisions. And as the court of appeals itself acknowledged in the *June Order*, only with that information can the public "intelligently participate in the Commission proceedings". (ARINC App. 25.) However, under the FCC's complaint processes, 47 C.F.R. §§ 1.701-1.735, complainants have no discovery entitlements, and therefore cannot obtain such data from the carrier—data essential to any hope of persuading the FCC to institute a hearing.[18] When added to the fact that the agency

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[17] *E.g., MCI Telecommunications Corp.* v. *American Tel. & Tel. Co.*, 462 F. Supp. 1072, 1080 (N.D. Ill. 1978). See also *id.* at 1088.

[18] In its Brief in Nos. 80-1343 and 80-1408 (p. 15, n. 14), AT&T misleadingly states that "post-complaint discovery clearly would be available to the Telpak users". In fact, discovery is *not* available until *after* the Commission designates a complaint for hearing, 47 C.F.R. § 1.311; it is unavailable for preparing or substantiating complaint allegations. Since the burden imposed on complainants would be virtually impossible to meet absent the type of data Section 61.38 requires—information wholly in AT&T's possession

will already have denied (in a tariff protest context) the same contentions renewed in the complaint, defeat once more is effectively assured.

In this last respect, the FCC's own brief in Nos. 80-1343 and 80-1408 itself confirms the futility of filing complaints with respect to Telpak. In a startling profession of prejudgment, FCC counsel warns that "[e]ven if the Commission were found to be in error on Section 214(a)", any remand for further agency proceedings would be superfluous since the agency "has made clear already by its actions that it does not believe the demise of Telpak would adversely affect the public convenience and necessity". (FCC Br. 21.) That a similar fate awaits the Telpak user complaints required by the court of appeals' rulings is obvious. Denial of any future complaints, witness the agency's own brief, is a foregone conclusion. This Court could have no more practical confirmation of finality.

On a more general plane, both the FCC and AT&T suggest to this Court that FCC complaint procedures under 47 U.S.C. §§ 206-209 provide the public no less protection against unlawful tariffs and agency arbitrariness than that enjoyed by the public prior to the court of appeals' decision below. (FCC Br. 14, n. 27; AT&T Br. 14-15.) Nothing could be farther from the truth. If anything, the FCC's complaint processes stand as a monument to agency inertia.

Appendix C hereto is a survey of the Commission's handling of complaints for the past decade. As there shown, for the period 1971-1979, the average length of time from the filing of a formal complaint until agency action was *approximately three years*. Indeed, in those

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and *not* subject to predesignation discovery—it is virtually assured that complainants could not obtain a hearing on generic tariff challenges. Appendix C hereto, which shows that the Commission has set only 13 of 139 complaints for hearing during 1971-1980, confirms that fact.

instances where complaints raised generic tariff lawfulness issues of the type involved here (as distinct, for example, from individual customer billing complaints), the average time for agency action during 1971-1979 was *58 months!* A number exceeded *seven years.* (See pp. C2-C5.) And attached as Appendix D is a recent FCC action on a complaint *nearly 10 years old*—an action ultimately forced by the D.C. Circuit itself. It is this regulatory limbo into which the court of appeals would force tariff protestants.[19]

Given the time constraints of Sections 203-204 of the Act, FCC action on tariff rejection requests heretofore has occurred at some point prior to the tariff's effective date. If objections based on patent unlawfulness were denied, it was possible to seek an immediate judicial stay of that decision (as in this case), or at least immediately to initiate appellate review. And in the usual circumstance, such appeals could be concluded within a year. Thus, if the agency's determinations were ultimately reversed, users would have been subject to the unlawful provisions of the tariff for no longer than that period. Under the new approach decreed by the court of appeals, however—and based on some 10 years of FCC history—users would now be subject to challenged tariffs for some indeterminate period *likely to exceed three to five years* before even being able to *present* contentions of patent unlawfulness to the courts.

Enabling the FCC to thus protract the time for resolving such matters is itself inconsistent with the Congressional design. As the court observed in *MCI*

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[19] The FCC's seeming inability promptly to resolve major tariff issues has been increasingly criticized by the courts during the past decade. E.g., *MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322, 343-46 (D.C. Cir. 1980); *Nader* v. *FCC*, 520 F.2d 182, 205-207 (D.C. Cir. 1975); *Lebanon Valley Radio, Inc.* v. *FCC*, 503 F.2d 196, 201 (D.C. Cir. 1974); *Fidelity Television, Inc.* v. *FCC*, 502 F.2d 443, 447, 452 (D.C. Cir. 1974).

Telecommunications Corp. v. *FCC*, *supra*, 627 F.2d at 340:

> [T]he entire ratemaking procedure in the 1934 Communications Act revolves around a "rule of reason" as to how long the FCC may take between the filing of tariff revisions and its final decision. It assumes that rates will be finally decided within a reasonable time encompassing months, occasionally a year or two, but not several years or a decade.[20]

Moreover, forestalling petitioners' access to the courts for such periods is equally contrary to this Court's repeated statements that the Administrative Procedure Act's "generous review provisions" must be given a "hospitable" interpretation. *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at 141; *Shaughnessy* v. *Pedeiro*, 349 U.S. 48, 51 (1955); see *United States* v. *Interstate Commerce Comm'n*, 337 U.S. 426, 433-34 (1979); *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Heikkila* v. *Barber*, 345 U.S. 229 (1953). As noted in *Abbott Laboratories*, *supra*, 387 U.S. at 141:

> [O]nly upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.

In unqualifiedly foreclosing judicial review where it has heretofore been permitted, the court of appeals' *November Order* basically held that, because Section 208 complaint procedures *exist*, FCC refusals to reject tariffs in response to Section 203-204 objections are

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[20] See also *id.* at 341:

> Many of the same considerations that impel judicial protection of the right to a "speedy trial" in criminal cases or implementation of civil decrees with all deliberate speed are not inopposite in agency deliberations. Those situations generally involve protection of constitutional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires. [Footnotes omitted.]

perforce non-final. However, the mere *possibility* that the same or similar issues could be presented in an alternative procedural context has never been held to render an FCC ruling unreviewable. To the contrary. In both *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956)—noted as consistent with *Abbott Laboratories* in *Standard Oil* (101 S. Ct. at 424)—this Court deemed FCC rulemaking actions final and reviewable even though the same challenges to those determinations could also have been adjudicated in a later enforcement action. So here, there was no conclusion required that, because processes are available to challenge carriers' administration of tariffs, rulings on the generic lawfulness of proposed tariffs services and rates are not reviewable. The court of appeals' holding that *Southern Railway* compels such a conclusion must be reversed.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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General Electric Company

April 7, 1981

Appendices

APPENDIX A

GENERAL ELECTRIC COMPANY

Active Non-Wholly Owned
Subsidiaries and Affiliates

AUSTRALIA

Australian General Electric Properties Limited
Australian General Electric (Sales) Limited
C. Dorman Pty. Ltd.
General Electric—Goninan Engineering Services Limited
General Electric-Rickard Limited
General Electric-STC Mobile Radio Pty. Limited
F. R. Tulk & Co. Pty. Limited

BAHRAIN

Middle East Engineering Limited

BRAZIL

Inducon do Brasil, Capacitores S.A.
Sade-Sul Americana de Engenharia S.A.

CANADA

Canadian General Electric Company Limited
Canadian Appliance Manufacturing Company Limited

CHILE

Electromat, S.A. Fabrica de Materiales Electricos

COLOMBIA

Condisa Limitada Ingenieros Contratistas S.A.
Sud Americana de Electrificacion S.A.

DENMARK

Storno A/S

FRANCE

W.Q.S. France S.A.R.L.
SNEF Electro-mechanique (S.E.M.)

GERMANY

General Electric Plastics GmbH
Westdeutsche Quarzschmelze GmbH

IRAN

Iran Electrical and Mechanical Service Company

ITALY

CGE-Compagnia Generale Elettromeccanica S.p.A.
SADELMI-COGEPI Compagnia Generale Progettazioni e Installazioni S.p.A.
Societa Nazionale delle Officine di Savigliano S.p.A.

JAPAN

Specialty Materials Technical Center (Japan), Inc.

LIBERIA

Utah Transport Inc.

MEXICO

General Electric de Mexico, S.A.

NEW ZEALAND

Waipipi Iron Sands Limited

NIGERIA

Sadelmi Nigeria Limited

PHILIPPINES

General Electric Philippines Meter and Instrument Co., Inc.
Philippine Electrical Manufacturing Company

SAUDI ARABIA

Middle East Engineering Limited Saudi Arabia
SADELMI Shaker Tamimi Construction Company

SINGAPORE

Watt & Akkermans Pte. Ltd.

SOUTH AFRICA

Allenwest (Cape) (Pty.) Limited
Reid & Mitchell (Pty.) Ltd.

SPAIN

General Electric Espanola, S.A.
Sociedad Anonima de Construcciones Electricas de Proteccion

TURKEY

General Elektrik Turk Anonim Sirketi

UNITED ARAB EMIRATES

Middle East Engineering Limited—U.A.E.

UNITED STATES

Adobe Canyon Corporation
General Electric Information Services Company
Isla del Sol Inc.
Little Medicine Development Company
Springer Mining Company, Inc.
Utah Development Company

VENEZUELA

Sud Americana de Electrificacion, S.A.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

AD HOC TELECOMMUNICATIONS USERS COMMITTEE
Complainant

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY
Defendant

File No. E-80-43

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 1981; Released: January 28, 1981

1. The Ad Hoc Telecommunications Users Committee (Committee) filed this complaint, incorporating by reference its "Petition to Reject or Suspend" American Telephone and Telegraph Company's (AT&T) Transmittal No. 13552. The Committee asserts that AT&T's proposed tariff revision which would terminate its Telpak offerings is unlawful. For the reasons discussed below, the Committee's complaint will be dismissed.

2. The Committee has apparently filed this complaint which incorporates its simultaneously filed petition because of a November 5, 1980 *Court Order* in *Aeronautical Radio, Inc.*, v. *FCC*, Nos. 77-1333, *et al.* (D.C. Cir.) The Committee reads that Order as suggesting that ". . . unless a complaint alleging the same matters has also been filed and acted on, Commission decisions denying rejection or suspension requests may not be judicially reviewable." (Complaint, p. 2) Although the Committee believes the November 5 Court Order to be in error, that Order is currently in effect. Therefore, the Committee

requests the Commission to consider and act on its complaint simultaneously with its consideration and action on the accompanying petition.[1] Otherwise, according to the Committee, it will be denied any opportunity to seek judicial review prior to implementation of the tariff revisions should the Commission fail to reject or suspend it.

3. The Committee's complaint fails to allege a cause of action under the Communications Act. The violations of Sections 201(a) and 214 which would allegedly occur as the result of the termination of Telpak, would not arise until after the effective date of the proposed tariff revisions. Section 204 of the Act establishes the procedure by which the Commission can take action to suspend or investigate a tariff revision before it becomes effective. The Committee's petition for rejection or suspension seeks the relief available under Section 204. Sections 206 to 209 of the Act, however, establish a procedure to obtain relief from acts or omissions of a carrier which violate the Act. AT&T has not yet done or omitted to do any act which is alleged to be in violation of the Communications Act.[2] Therefore, the Committee's complaint is premature.

4. Accordingly, IT IS ORDERED, That the complaint filed by the Ad Hoc Telecommunications Users Committee is dismissed, without prejudice to refiling on or after the effective date of AT&T's proposed tariff revision.

/s/ Joseph A. Marino
JOSEPH A. MARINO
Chief, Enforcement Division
Common Carrier Bureau

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[1] The Committee also requests a waiver of Sections 1.730-1.733 to enable the Commission to order AT&T to answer the complaint

[2] We do not understand the Committee's complaint to allege that on the same day it responds to the Committee's petition.

the mere filing of this proposed tariff revision is in and of itself a violation of the Act.

APPENDIX C

FCC FORMAL COMPLAINT PROCESSES, 1971-1980

During the period December, 1980-March, 1981, a review of the Federal Communications Commission's records concerning formal complaints was undertaken. The data appearing in the tables which follow represent the results of that effort. The information compiled does not purport to be a definitive statistical analysis. Time constraints, and the absence of organized agency files for the period preceding 1980, precluded any such precision. The tables do, however, represent a fair summary of the available FCC records for the period involved.

Table 1 is an effort to glean from the 1971-1979 complaints those which might most closely approximate the type of complaint contemplated by the court of appeals' decision below. The length of time to FCC action or settlement is shown; whether a hearing was ordered on the complaint allegations is also indicated.

Tables 2 through 4 attempt generally to group the remaining 1971-1979 complaints in ways which might reflect potentially different timetables for agency disposition. Table 5 shows the status of 1980 complaints.

With respect to the matters GE believes to be most pertinent here, those tables individually reflect the following:

	Total Number of Complaints	Average Time to FCC Action [1]	Number of Evidentiary Hearings Ordered
Table 1—	29	58 months	5
Table 2—	33	20 months	2
Table 3—	30	26 months	5
Table 4—	9	37 months	0
	101	35 months	12

[1] Excludes complaints as to which FCC data was incomplete, or which were voluntarily settled by the parties.

TABLE 1

FCC—Formal Complaints Concerning
Reasonableness or Lawfulness of Tariffs, 1971-1979

File No.	Case Name	Subject	Date of Complaint	Date of FCC Action [1]	Date Settled	Evidentiary Hearing Ordered
TS 1A-74	Cruces Cable Co. v. American Television Relay ("ATR")	Unreasonable and discriminatory rates	11/5/71	1/7/81	—	No
TS 1B-74	El Paso Cablevision v. ATR	Unreasonable and discriminatory rates	8/4/72	pending	—	No
TS 5-74	Dept. of Defense v. WU Telegraph	Rates for Autodin service	12/11/72	1/15/75	—	No
TS 6-74	North Platte Multi-Vue TV System and McCook Multi-Vue TV System v. Mountain Microwave Corp.	Unlawful rates, poor service	2/6/73	9/11/80	—	No
TS 9-74	Computoll v. AT&T and N.Y. Tel.	WATS tariff; lawfulness of interconnection provisions	3/15/73	5/27/76	—	No
TS-11-74	Associated Press v. AT&T	Lawfulness of AT&T Tariff No. 260	8/28/73	9/11/75	—	No

TS 23-74	Dept. of Defense v. AT&T and Hawaiian Tel. Co.	§ 201(b); reasonableness of rates	8/5/74	pending	—	Yes
TS 34-74	Dept. of Defense v. Hawaiian Tel. Co.	Reasonableness of Channel C conditioning rates	11/1/72	*	—	
TS 36-74	Aeronautical Radio v. AT&T	Change in number of telegraph grade channels	2/26/71	pending	—	No
TS 40-74	Dept. of Defense v. AT&T and Hawaiian Tel. Co.	§ 202 discrimination	4/10/74	5/5/80	—	No
TS 16-75	Mutual Broadcasting System, Inc. v. AT&T	Unreasonable rates (Series 6000)	4/24/75	6/1/78	—	No
TS 25-75	Dept. of Defense v. AT&T et al.	Failure to file interstate tariff	6/4/75	5/18/78	—	No
TS 43-75	Mobile Marine Radio v. S. Central Bell Tel. Co.	Discriminatory terms in interconnection agreements	9/26/75	—	7/22/77	Yes
TS 53-75	Teleprompter v. Pacific Teletronics	Increased rates	*	*		

[1] Unless otherwise indicated, "pending" designations indicate status as of 2/11/81.

* FCC data incomplete.

TABLE 1—Continued

File No.	Case Name	Subject	Date of Complaint	Date of FCC Action	Date Settled	Evidentiary Hearing Ordered
TS 55-75	Dept. of Defense v. AT&T	Unreasonable rates	12/12/75	pending		No
TS 1-76	Dept. of Defense v. AT&T	Reasonableness of rates—§ 201(b), § 202(a)	1/15/76	5/5/80	—	No
TS 4-76	Dept. of Defense v. C&P Tel. Co. and AT&T	Filing of private line rates for D.C. area (§ 203)	3/26/76	7/5/78	—	No
TS 5-76	Dept. of Defense v. C&P Tel. Co.	Improper charges for private line service	2/26/76	pending	—	Yes
TS 8-76	CBEMA v. WU	Rates—FYI service (§ 202)	4/23/76	3/12/81	—	No
TS 12-76	Diamond International Corp. v. AT&T and N.Y. Tel. Co.	Charges exceeding tariff rates	7/20/76	12/12/78	—	No
TS 7-77	Northern Television v. RCA Alascom	§§ 201(b), 202(a); unreasonable and discriminatory rates	4/22/77	5/21/80	—	No
TS 14-77	Micro-Cable Communications v. American Television Relay	Unlawful charges CATV system for retransmission	9/1/77	—	7/18/80	No

TS 2-78	Industrial Communications Systems v. Pacific T&T and Gen'l Tel. Co. of California	Violations of § 202(a) and *Guardband* decision (interconnection charges)	10/31/77	10/18/78	—	No
TS 3-78	Rogers Radio Communications Services v. Illinois Bell and AT&T	Violations of *Guardband* decision	10/28/77	pending	—	Yes
TS 5-78	ITT Worldcom v. AT&T and Pacific T&T	§ 202—discrimination against IRC's for end links (48 kHz)	5/9/78	pending	—	Yes
TS 6-78	U.P. TV Systems v. American Microwave and Communications	§ 202(a) rate discrimination	5/16/78	pending	—	No
TS 11-78	Applied Facsimile Communications v. WU	Unlawful cross-subsidization	8/25/78	pending	—	No
TS 12-79	Jackson County Cable Systems v. United Video	§§ 201(b), 202(a); reasonableness of termination charge	7/3/79	—	1/23/81	No
TS 1-80	Hugo Cablevision v. Cablecom-General	§§ 201, 202 violations (cable rates)	10/19/79	—	1/28/80	No

TABLE 2

Non-Carrier Formal Complaints, 1971-1979,
Other Than Those Reflected in Table 1

File No.	Case Name	Date of Complaint	Date of FCC Action
TS 10-74	Boyd v. C&P Tel. Co.	6/16/73	4/4/75
TS 12-74	McCann v. C&P Tel. Co. and AT&T	7/30/73	1/22/75
TS 14-74	Rice Int'l Corp. v. AT&T and Southern Bell Tel. Co.	8/6/73	11/22/77
TS 16-74	Roth v. C&P Tel. Co.	10/31/73	3/18/75
TS 18-74	Lockard v. C&P Tel. Co. of Va.	11/28/73	1/15/75
TS 19-74	West State Broadcasters (WZND-FM) v. AT&T	1/24/74	**
TS 22-74	Computoll v. AT&T and N.Y. Tel. Co.	6/27/74	10/1/75
TS 4-75	Hoffman v. Southern Bell	**	6/17/75
TS 15-75	Lone Star v. Southwestern Bell	**	**
TS 32-75	Contronics v. Puerto Rico Tel. Co.	7/2/75	**
TS 34-75	Ringer v. AT&T and N.Y. Tel. Co.	7/9/75	2/22/78
TS 42-75***	Strouth v. WU Telegraph	9/16/75	9/26/78
TS 48-75	The Telephone Co., Inc. v. Central Tel. Co. of Nevada	11/6/75	**
TS 51-75	Battle v. N.Y. Tel. Co.	11/20/75	**
TS 54-75	Johnson v. Mountain Bell Tel. Co.	8/27/75	2/26/76

* Settled by the parties

** FCC data incomplete

***Evidentiary hearings ordered

TABLE 2—Continued

File No.	Case Name	Date of Complaint	Date of FCC Action
TS 56-75	State of Nebraska v. Northwestern	12/22/75	3/1/76*
TS 3-76	Evans v. WU Telegraph	2/25/76	5/19/76*
TS 6-76	Heng v. Two-Way Radio Communications Co. of Kansas	4/19/76	8/10/77*
TS 3-77	Tele-Valuation v. AT&T	1/11/77	3/8/78
TS 5-77	Radio Broadcasting Co. et al. v. N.J. Bell Tel. Co.	3/31/77	2/28/78
TS 6-77	Ash v. Pacific T&T	3/14/77	11/8/79
TS 1-78	AFA Protective Systems v. N.J. Bell and AT&T	10/14/77	5/14/80
TS 4-78	Colbert's Security Services v. New England Tel. Co. and AT&T	2/2/78	5/14/80
TS 7-78***	Edwards v. Nevada Bell, Pacific T&T and AT&T	6/1/78	3/14/80
TS 8-78	Home Box Office v. Micro TV	6/7/78	2/16/79
TS 5-79	Edwards v. Nevada Bell	12/7/78	6/11/80
TS 6-79	Enercom v. SW Bell and AT&T	12/15/78	10/31/79*
TS 9-79	Dept. of Defense v. Hawaiian Tel. Co.	1/17/79	4/22/80
TS 10-79	Spanish International v. RCA Americom	5/14/79	6/25/80
TS 13-79	Mass.—Conn. Mobile Tel. Co. v. Page Boy Inc.	8/17/79	9/8/80
TS 14-79	Common Carrier Ass'n for Telecommunications v. Robert Cooper d/b/a CATG Laboratory	8/9/79	9/25/79*
TS 3-80	Rogers Radio Communication Services v. Illinois Bell	10/31/79	7/2/80

* Settled by the parties

***Evidentiary hearings ordered

TABLE 3

Formal Complaints Involving
Disputes Between Carriers, 1971-1979

File No.	Case Name	Date of Complaint	Date of FCC Action
TS 17-74	Fields v. Pacific NW Bell	11/7/73	pending
TS 42-74	RCA Globcom v. Hawaiian Tel. Co.	11/11/74	9/28/76
TS 1-75	III Worldcom v. N.Y. Tel. Co.	12/26/74	4/21/75
TS 8-75	WUI v. N.Y. Tel. Co.	2/24/75	5/27/75*
TS 30-75	WU Telegraph v. RCA Globcom	6/20/75	**
TS 31-75	WU Telegraph v. ITT Worldcom	6/20/75	**
TS 45-75	American Satellite Corp. v. MCI	10/7/75	2/10/76
TS 46-75	American Satellite Corp. v. Southwsetern Bell Tel. Co.	10/23/75	9/22/77*
TS 7-76	MCI v. AT&T and Pacific T&T	9/22/76	9/13/79
TS 10-76***	Peoples Tel. Coop. v. Southwestern Bell and Gen'l Tel. Co. of the Southwest	2/25/76	6/1/77*
TS 15-76, TS 1-77	ITT Worldcom v. Puerto Rico Tel. Co.	8/27/76	4/28/77
TS 16-76***	MCI v. AT&T	4/8/76	pending
TS 17-76	MCI v. Bell Tel. Co. of Pa. et al.	7/30/76	3/5/80
TS 2-77***	Offshore Tel. Co. v. S. Central Bell and AT&T	12/28/76	pending
TS 4-77	Micro-Cable Communications v. American Television Relay	3/25/77	6/16/80

* Settled by the parties

** FCC data incomplete

***Evidentiary hearings ordered

TABLE 3—Continued

File No.	Case Name	Date of Complaint	Date of FCC Action
TS 8-77	ITT Worldcom v. WU	5/2/77	7/22/80
TS 10-77	American Satellite v. GTE Satellite and Hawaiian Tel. Co.	7/14/77	7/10/78
TS 12-77	ITT Worldcom v. WUI	8/12/77	7/25/78
TS 15-77	RCA Globcom v. WU Telegraph	9/6/77	4/22/80
TS 1-79***	WUI v. AT&T, Pacific T&T and Southern Bell Tel. Co.	10/27/78	pending
TS 2-79	American Satellite Corp. v. WU Telegraph	11/2/78	11/19/79
TS 3-79	Lincoln Community Telephone System v. Mountain States T&T	11/20/78	9/10/80
TS 4-79	ITT Worldcom v. Pacific T&T	11/15/78	5/31/79
TS 7-79	ITT Worldcom v. Hawaiian Tel. Co. and AT&T	1/29/79	pending
TS 8-79	ITT Worldcom v. Hawaiian Tel. Co. and AT&T	1/17/79	pending
TS 11-79	ITT Worldcom v. Puerto Rico Communications Authority	5/24/79	4/22/80
TS 2-80	ITT Worldcom v. AT&T	10/26/79	5/21/80
TS 4-80	Eastern Microwave v. RCA Americom	6/1/79	6/25/80
TS 5-80	ITT Worldcom v. RCA Globcom	11/16/79	5/29/80
TS 6-80***	ITT Worldcom v. AT&T	11/26/79	pending

***Evidentiary hearings ordered

TABLE 4

Formal Complaints Involving Allegations of Unlawful Common Carriage, 1971-1979

File No.	Case Name	Date of Complaint	Date of FCC Action
TS 29-74	ITT Worldcom v. Telecommunications Industries, WU, and TRT	9/74	**
TS 45-74	WU v. Graphic Scanning	7/25/73	4/26/79
TS 13-75	ITT Worldcom v. Hawaii Data Communications	3/28/75	11/9/78
TS 23-75	ITT Worldcom v. Flash Messages	5/7/75	10/30/75
TS 47-75	WU Telegraph v. Wiltek	11/5/75	pending
TS 9-76	ITT Worldcom v. Telex Answering Service	5/20/76	12/6/76*
TS 11-77	ITT Worldcom v. Executive Telex Service	7/19/77	**
TS 9-78	ITT Worldcom v. Consortium Communications	6/14/78	2/12/80
TS 10-78	RCA Globcom v. Consortium Communications	7/6/78	2/12/80

* Settled by the parties

**FCC data incomplete

TABLE 5
FCC—Formal Complaints Filed in 1980

File No.	Case Name	Subject	Date of Complaint	Date of FCC Action or Settlement	Evidentiary Hearing Ordered
E-80-7	Sergio Diaz v. Pacific T&T	billing dispute	1/21/80	12/1/80	No
E-80-8	WUI v. Comsat	rate discrimination	1/28/80	pending	No
E-80-9	ITT Worldcom v. RCA Globcom	rates	2/5/80	6/9/80	No
E-80-10	United Cable TV Corp. v. American Television Relay ("ATR")	rates	3/7/80	pending	No
E-80-11	UA-Columbia v. ATR	rates	3/7/80	pending	No
E-80-12	Teleprompter v. ATR	rates	3/7/80	pending	No
E-80-13	Cable News Network v. RCA Americom	provision of service (satellite leasing)	3/21/80	6/25/80	No
E-80-14	Computoll v. MCI	provision of services	3/24/80	9/2/80	No
E-80-15	National Christian Network v. RCA Americom	provision of service (satellite leasing)	4/16/80	6/25/80	No
E-80-16	ITT Worldcom v. WU Telegraph	interconnection	5/1/80	pending	No
E-80-17	Capital Telephone v. N.Y. Tel.	provision of service	5/12/80	pending	No
E-80-18	ITT Worldcom v. TRT	rates	5/14/80	8/27/80	No
E-80-19	WACO v. Mid-Texas	rates	5/22/80	pending	No

TABLE 5—Continued

File No.	Case Name	Subject	Date of Complaint	Date of FCC Action or Settlement	Evidentiary Hearing Ordered
E-80-20	Com. Services v. Murraysville Tel. Co.	interconnection	6/5/80	pending	No
E-80-21	TRT v. RCA Globcom	compliance with international formula	6/18/80	1/7/81	No
E-80-22	TRT v. ITT Worldcom	compliance with interstate formula	6/18/80	1/7/81	No
E-80-23	KLF Electronics v. Indiana Bell	customer use of PBX	7/17/80	10/15/80	No
E-80-24	RCA Globcom v. WUI	rates	7/21/80	pending	No
E-80-25	Citibank v. Graphnet/Graphic Scanning	unlawful carriage and rates	7/23/80	pending	No
E-80-26	WU Telegraph v. WUI	rates	7/24/80	pending	No
E-80-27	American Colloid Co. v. Illinois Bell and AT&T	billing dispute	7/28/80	3/2/81	No
E-80-28	RCA Globcom v. WU Telegraph	interconnection	7/29/80	pending	No
E-80-29	RCA Globcom v. WU Telegraph	interconnection	7/29/80	pending	No
E-80-30	Peter Batal and Capital Tel. Co. v. Pattersonville Tel. Co.	interconnection	7/23/80	pending	No

E-80-31	Telephonic Equipment v. AT&T and Southern Bell	discrimination	8/29/80	11/21/80	No
E-80-32	WUI v. RCA Globcom	rates	9/5/80	pending	No
E-80-33	WUI v. WU Telegraph	discrimination	9/8/80	11/21/80	No
E-80-34	WU Telegraph v. AT&T and Bell System Operating Cos.	rates	9/30/80	pending	No
E-80-35	Satellite Program Network v. RCA Americom	discrimination	10/6/80	10/30/80	No
E-80-36	Transaction Technology v. AT&T, N.J. Tel. Co., and C&P Tel. Co.	discrimination	10/7/80	pending	No
E-80-37	Nat'l Ass'n of MDS Service Cos. v. Microband Corp.	discrimination	10/15/80	12/24/80	No
E-80-38	WUI v. AT&T, Pacific T&T, and Southern Bell T&T	rates	10/24/80	pending	No
E-80-39	WUI v. WU Telegraph	interconnection	10/30/80	pending	No
E-80-40	Delta v. AT&T	rates and discrimination	11/24/80	pending	No
E-80-41	Delta v. AT&T	rates	11/24/80	pending	No
E-80-42	Warner Oil v. Pampa Communications Co.	poor mobile phone service	12/12/80	1/15/81	No
E-80-43	Ad Hoc Telecommunications Users v. AT&T	Telpak termination	12/1/80	1/28/81	No
E-80-44	Ad Hoc Telecommunications Users v. AT&T	WATS tariff revisions	12/3/80	1/28/81	No

APPENDIX D

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

EL PASO CABLEVISION, INC.
Complainant

v.

AMERICAN TELEVISION RELAY, INC.
Defendant

File No. TS 1-74

MEMORANDUM OPINION & ORDER

Adopted: March 10, 1980; Released: March 12, 1980

By the Chief, Common Carrier Bureau:

1. In a pending rulemaking proceeding the Commission has encouraged the parties in this and several other cases to settle their disputes. See para. 5 below. At the request of complainant, El Paso, the U.S. Court of Appeals for the D.C. Circuit recently ordered the Commission to commence proceedings by March 15, 1980. The parties, at the suggestion of the Bureau staff, recently met in an attempt to settle the dispute, but without success. We have therefore concluded that the procedures outlined below should help expedite resolution of this dispute. This order, which is entered pursuant to delegated authority, is designed to implement the Commission's and the D.C. Circuit's outstanding orders.

2. El Paso, a wholly owned subsidiary of Teleprompter Corporation, filed a formal complaint on August 4, 1972 against American Television Relay, Inc. (ATR). El Paso complained about the rate of $9,580 charged by ATR for microwave service to El Paso's CATV system during the period February 1, 1972 to January 11, 1973. See 35 FCC 2d 707 (1972). El Paso alleged that the rate was unreasonable and unjustly discriminatory in violation of Sections 201 and 202(a) of the Communications Act respectively and requested that it be awarded damages as provided for in Section 206 of the Act. 47 U.S.C. 201, 202(a) and 206. Although the complaint was filed in August, 1972, the rate challenged by El Paso was effective until January 11, 1973. At that time, a new set of rates applicable to all of ATR's customers including El Paso became effective. These rates which were based in part on the population of the customer's area were the subject of a formal investigation in Docket 19609, *American Television Relay, Inc., Revised Rates for Microwave Services*, 37 FCC 2d 751 (1972).

3. The Commission deferred taking action on this complaint, choosing instead to concentrate its limited resources on the investigation instituted in Docket 19609 to determine the lawfulness of ATR's then effective rate structure. It stated, however, that once this proceeding was concluded it would consider El Paso's claim for monetary damages. 39 FCC 2d 554 (1973).

4. The Commission issued its decision in the ATR investigation in March 1977 finding, among other things, that the carrier had improperly calculated some elements of its revenue requirements and that the use of a population sensitive rate structure was an unjustified departure from cost-based rates. *ATR*, 63 FCC 2d 911 (1977). It denied petitions for reconsideration, 65 FCC 2d 792 (1977), and established a methodology for deter-

mining the refunds due the users for the period January 11, 1973 to September 20, 1977. 67 FCC 2d 703 (1978).

5. Although the formal investigation in Docket 19609 is finished, the Commission has not yet instituted a proceeding to examine the complaints of either El Paso or other complainants. Instead, in CC Docket No. 79-252 (*Policy and Rules Concerning Rates for Competitive Carrier Services*, FCC 79-599, released November 2, 1979) the Commission requested that the parties to several pending dockets and formal complaints including the one here, reexamine their positions to determine whether they could settle their differences informally. See paras. 94-96.

Discussion

6. El Paso had earlier filed two motions to resume this proceeding. The first was submitted in July 1975 after the Chief, Common Carrier Bureau issued his recommended decision in Docket 19609. The second was filed on July 6, 1978. No action was taken on these motions and on December 19, 1979, at the request of El Paso, the Court of Appeals for the District of Columbia Circuit issued an order directing the Commission to begin proceedings on the El Paso complaint by March 15, 1980. (*El Paso Cablevision, Inc.* No. 79-1292).

7. The staff has met with the attorneys for El Paso and ATR on February 11, 1980 to determine whether a settlement could be reached. Both sides fully participated in the discussions. El Paso subsequently agreed with the staff that it may be helpful if each party is required to submit to the Commission a prehearing brief, outlining the facts to be proven, the questions presented and a memorandum of points and authorities detailing its legal position. At the very least, these pleadings will help update the record and narrow the focus of any further proceedings which may be necessary. And, of course,

after they review each other's positions, El Paso and ATR may conclude that a negotiated settlement rather than a hearing is the better way for resolving their dispute, as the Commission suggested in the *Competitive Carrier* proceeding, *supra.*

8. We, therefore, will require El Paso and ATR to submit the prehearing pleadings mentioned above detailing their position in this case. We will also require the filing of replies which should identify with particularity those matters which are still in dispute between the parties. The schedule for submitting these documents is set forth below. These pleadings should include a detailed outline of all evidence and data upon which a party relies to support its position. For example, if ATR proposes to claim that the rate in question was reasonable, it should provide a summary of the cost information necessary to justify the rate together with a full explanation of how it allocated its system costs to its El Paso service. If, on the other hand, El Paso claims that the rate in question was unjustly discriminatory, it must provide evidence showing the actual damages it has suffered as a result of the discriminatory rate. The legal authorities cited below may help the parties refine their legal positions.[1]

9. Accordingly, IT IS ORDERED That, pursuant to sections 154(i) and (j), 201, 203, 206 and 208 of the Communications Act, and sections 0.91, 0.95 and 0.291 of the Commission's Rules, (47 CFR 0.91, 0.95 and 0.291) El Paso Cablevision, Inc. and American Television Relay, Inc. shall submit:

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[1] See e.g. *I.C.C.* v. *United States, ex rel. Campbell* 289 U.S. 385, 389-390 (1933); *ASG Industries* v. *U.S.* 548 F. 2d 147, 152 (6th Cir. 1978); *Fallon Travelodge et al.* 14 FCC 2d 972, 974 (1968). *But compare Southern Pacific Co.* v. *Darnell-Tainger Lumber Co.* 245 U.S. 531 (1918) (automatic refund available in cases involving unreasonable rates).

D5

Prehearing Brief, Questions
Presented and Points and
Authorities (or Settlement Agreement)
on March 31, 1980

and

Replies (or Settlement Agreement)
on April 7, 1980

FEDERAL COMMUNICATIONS COMMISSION

/s/ Philip L. Verveer
PHILIP L. VERVEER
Chief, Common Carrier Bureau

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